

## Alabama Law Scholarly Commons

---

Articles

Faculty Scholarship

---

1991

### Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills Colloquy

Richard Delgado

*University of Alabama - School of Law*, [rdelgado@law.ua.edu](mailto:rdelgado@law.ua.edu)

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_articles](https://scholarship.law.ua.edu/fac_articles)

---

#### Recommended Citation

Richard Delgado, *Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills Colloquy*, 80 Geo. L.J. 1879 (1991).

Available at: [https://scholarship.law.ua.edu/fac\\_articles/402](https://scholarship.law.ua.edu/fac_articles/402)

This Article is brought to you for free and open access by the Faculty Scholarship at Alabama Law Scholarly Commons. It has been accepted for inclusion in Articles by an authorized administrator of Alabama Law Scholarly Commons.

# Zero-Based Racial Politics and an Infinity-Based Response: Will Endless Talking Cure America's Racial Ills?

RICHARD DELGADO\*

In *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*,<sup>1</sup> I addressed the question, with which of three political factions ought the nonwhite poor align themselves?<sup>2</sup> I used the term "zero-based" in the title to focus the inquiry on what course of action would be best for that beleaguered group if we could set aside inertia, habit, traditional alliances, and the like.<sup>3</sup> My answer was that the nonwhite poor should consider aligning themselves with the principled right of the Republican Party.<sup>4</sup>

In his reply article, *Whose Common Good? Racism in the Political Community*,<sup>5</sup> Professor Stephen Feldman urges that: (1) racism is much more wide-ranging and pervasive than most Americans, including constitutional scholars, realize;<sup>6</sup> (2) appeals to logrolling and self-interest, like those in *Zero-Based Racial Politics*, are unlikely to prove able to cope with ills of such dimension as racism;<sup>7</sup> and (3) the right approach is communitarianism, which, through a process of dialogue and self-examination, will enable us to reshape our community and self-concept in a fairer, less racist direction.<sup>8</sup>

I welcome and agree with much of what Feldman says. His insight into racism's continuing efficacy and the need for its treatment in all areas of constitutional law, not just equal protection, is valid and urgent.<sup>9</sup> Indeed, I

---

\* Charles Inglis Thomson Professor of Law, University of Colorado; J.D., Boalt Hall School of Law, University of California, Berkeley, 1974.

1. Richard Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929 (1990).

2. The three positions or interest groups I examined were the moderate left (i.e., the Democratic Party), *id.* at 1933-37; the moderate right (i.e., the Republican Party), *id.* at 1940-45; and the dialogic left (represented by the emerging strand of communitarian and civic republican writers including Joel Handler, Michael Sandel, Alasdair MacIntyre, and Frank Michelman), *id.* at 1937-40.

3. *Id.* at 1931-32 (explaining term "zero-based").

4. *Id.* at 1940-48 (explaining reasons why this group was likely to prove a better ally and source of aid to black underclass than other groups).

5. Stephen Feldman, *Whose Common Good? Racism in the Political Community*, 80 GEO. L.J. 1835 (1992).

6. *Id.* at 1839 ("[r]acism runs . . . deep and wide"); *id.* at 1846-47 (virtually everyone in American society harbors racist attitudes; racism ingrained in American culture).

7. *Id.* at 1840-49 (pragmatic racial politics based on appeals to whites' self-interest will fail because racism prevents most whites from recognizing when their interests coincide with those of African Americans).

8. *Id.* at 1850-76 (explaining why a reconstructed dialogism offers promise of abating racism).

9. See T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Ra-*

have made similar arguments elsewhere (although not so eloquently).<sup>10</sup> Yet, as I shall argue, his insight does not go far enough. Racism is not merely common, it is natural and normal—the ordinary state of affairs.<sup>11</sup> It informs all our preconceptions and mental pictures. It is the “normal science” of our day, part of the baseline, the from-which-we-reason.<sup>12</sup> Conversation begins with racist premises.<sup>13</sup> Indeed, talking will likely just rehearse the dominant narrative, inscribing its supremacist message even more deeply. Feldman’s insight about racism’s ubiquity is, unfortunately, at war with his idealistic prescription.<sup>14</sup>

Part I of this article sets out three reasons why conversation is unlikely to provide an effective remedy for society’s racial ills, each stemming from modernist and postmodernist understandings of language, narrativity, and the social construction of reality. I then examine the role of normative discourse in combating racism. It is clear from Feldman’s article that the conversation in which he wishes us to engage on matters of race would emphasize this element heavily—would include much exhortation, shaming, preaching, and reminding of superordinate common goods and norms.<sup>15</sup> Normative discourse, however, has special pitfalls for the would-be social reformer which I detail in Part II. A brief conclusion lays out what remains after we under-

---

cism, 63 U. COLO. L. REV. (forthcoming 1992) (describing current pervasive racial discrimination in housing, employment, and education, and citing numerous examples of resurgent hate crimes).

10. See, e.g., Richard Delgado, *Enormous Anomaly? Left/Right Parallels in Recent Writing About Race*, 91 COLUM. L. REV. 1547, 1554-56 (1991) (noting current dissatisfaction of both critical race theorists and neoconservatives with current liberal civil rights program); Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1393-94 (1991) [hereinafter Delgado, *Recasting*] (arguing racism is the normal state of affairs, not the exception); see also Richard Delgado & Jean Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEX. L. REV. 1929, 1929-32 (1991) (arguing diffidence toward outsider groups colors judicial thinking, and disposes even great jurists to write opinions that society later condemns).

11. See DERRICK BELL, *AND WE ARE NOT SAVED* 26-50 (1987) (barriers to racial equality were adopted by society at beginning of nation’s history); Delgado, *Recasting*, *supra* note 10, at 1393-94 (arguing “racial subordination is an ordinary, ‘normal’ feature of our social landscape”).

12. On normativity as the “normal science” of our day, and its apologetic function in current discourse, see Richard Delgado, *Norms and Normal Science: Toward a Critique of Normativity in Legal Thought*, 139 U. PA. L. REV. 933, 960 (1991) (pointing out that the dominant, normative mode of discourse renders racial reform difficult). See generally Symposium, *The Critique of Normativity*, 139 U. PA. L. REV. 801 (1991).

13. See Derrick Bell & Preeta Bansal, *The Republican Revival and Race*, 97 YALE L.J. 1609, 1610-12 (1988) (republicanism assumes a social consensus, and history shows that consensus to be racist); Richard Delgado, *Legal Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-13 (1989) (legal and political discourse takes place against a backdrop of presuppositions and shared understandings); Mari Matsuda, *Affirmative Action and Plowed-Up Ground*, 11 HARV. WOMEN’S L.J. 1, 2 (1988) (need to incorporate outsiders’ vision to combat racist preconceptions).

14. On the critique of “conversationalism” in legal theory, see generally Robert Justin Lipkin, *Kibitzers, Fuzzies, and Apes Without Tails: Pragmatism and the Art of Conversation in Legal Theory*, 66 TUL. L. REV. 69 (1991).

15. See *infra* text accompanying notes 50-57.

stand conversationalism's limitations, and specifies a slightly revised role for progressives, like Feldman, who would apply their impressive talents and energies toward an antiracist program of reform.

## I. CONVERSATIONALISM AND ITS LIMITS

Verbal exchanges—conversations—are useful correctives for many types of error. For example, if you point out to me that I have inadvertently parked my car in a no-parking zone and am likely to get a ticket, I will very likely move it. If I mistakenly believe that a heavy object, such as a lead ball, will fall faster in a vacuum than a light one, say a feather, and you stage a demonstration showing that this is not so, I will very probably modify my beliefs accordingly.<sup>16</sup> Verbal exchanges are not likely, however, to be able to correct broad, systemic ills, such as racism, for a number of reasons.

### A. THE FIRST REASON—RACISM IS PART OF THE “DOMINANT NARRATIVE”

Racism is deeply ingrained in our culture, affecting how we see ourselves and others, and how we organize social life.<sup>17</sup> Messages about race begin to shape our perception at a very early age.<sup>18</sup> They bombard us from many sources—children's stories, advertising logos, movies, television, the lessons of parents and peers.<sup>19</sup> These messages tell us that skin color matters, that it is a determinant of action, personality, and character. Racism is much more

---

16. The latter fact does not entail a structural change in my attitudes or understanding of the physical world; it is part of “normal science,” i.e., within the current paradigm. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 77-79 (2d ed. 1970) (shift in paradigm occurs only when current paradigm unable to account for anomaly and alternative theory available).

17. See Kimberle Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1370-76 (1988) (discussing ways racism is used to establish a community in opposition to the “other”); Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-56 (1978) (describing how antidiscrimination law is embedded in the perspective of the perpetrator, and thus legitimizes oppression); see also *supra* notes 9-13 and accompanying text.

18. See Richard Delgado, *Words That Wound: Tort Actions for Racial Slurs, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 138-43 (1982) (summarizing literature on this point). See generally MARY ELLEN GOODMAN, *RACE AWARENESS IN YOUNG CHILDREN*, (1977).

19. See Crenshaw, *supra* note 17, at 1370-76 (discussing how black stereotypes “serve a hegemonic function by perpetrating a mythology about both Blacks and whites”); Freeman, *supra* note 17, at 1052-57 (arguing that antidiscrimination law, viewed traditionally from the perspective of the perpetrator, fails to address the real needs of the victimized group). For a detailed survey of the depiction of major ethnic minority groups in film, popular literature, advertising logos, and other media over 200 years of American history, see Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture*, 77 CORNELL L. REV. (forthcoming 1992). See also *Ethnic Notions* (PBS television documentary, Feb. 1, 1988) (reviewing history of media depiction of African Americans beginning with colonial times).

than the occasional, isolated, shocking incident we sometimes read about and condemn—the black who is beaten by a white mob or denied a job or an apartment, the minority child who is placed in a remedial track in school despite average or higher intelligence.<sup>20</sup> Rather, it is a way of organizing the world, part of the “dominant narrative.” This understanding of society changes extremely slowly; we rarely perceive the racism of our age, only that of previous ages.<sup>21</sup> Any message or suggestion that conflicts with the widely shared understanding strikes the hearer as coercive, “political,” extreme, or bizarre.<sup>22</sup> This was true of previous eras, and is just as true of our own.<sup>23</sup>

Since racial assumptions are ingredients in our understanding of “how the world is,” they will inevitably affect which ideas and speakers we credit. Imagine, for example, a conversation between a white, liberal faculty appointments committee member and a colleague of color about affirmative action at the law school. The professor of majority race has consulted his or her minority colleague about the problem of finding qualified candidates of color.<sup>24</sup> The appointments committee has been trying hard, the white professor reports, but the pool is so small.<sup>25</sup> Would it be sensible for the school to “take a chance” and hire candidates *A* or *B*, who lack the usual credentials the committee seeks, but who nevertheless look promising? Would this be fair to the candidates? To our students?

Imagine the colleague of color carefully examines the candidates’ resumes, then announces that, judging from his experience, both *A* and *B* are likely to prove superlative professors whose publishing and teaching will far exceed that of the majority-race candidates the committee is currently considering.

---

20. See, e.g., Freeman, *supra* note 17, at 1054 (pointing out that law’s condemnation of the occasional vicious-willed cross burner or other perpetrator of flagrant racist acts enables us to believe that our society otherwise functions in nonracist, egalitarian fashion); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 317-18, 336-44 (1987) (citing evidence and examples of unconscious racism).

21. See Delgado & Stefancic, *supra* note 19 (referring to belief that we *can* see the racism of our time as “empathic fallacy”); Delgado & Stefancic, *supra* note 10 at 1953-57 (presenting evidence of social bias in literature and the incremental rate at which change occurs).

22. See Richard Delgado, *The Imperial Scholar Revisited: How to Marginalize Outsider Writing Ten Years Later*, 140 U. PA. L. REV. 1349 (1992); see also JEFF ADAMS, *THE CONSPIRACY OF THE TEXT: THE PLACE OF NARRATIVE IN THE DEVELOPMENT OF THOUGHT* (1986); ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOK* 323-43 (Q. Hoare & G.N. Smith trans./eds., 1971) (intellectual revolution cannot be achieved solely by confronting one philosophy with another; “common sense,” the uncritical and unconscious way of understanding the world must also be confronted); Terrence Des Pres, *On Governing Narrative: The Turkish-Armenian Case*, 75 YALE L. J. 517 (1986).

23. See generally Delgado & Stefancic, *supra* note 19; *Ethnic Notions*, *supra* note 19.

24. I analyze several aspects of this problem through the use of “counter-storytelling” in *Oppositionists*, *supra* note 13, at 2418-35.

25. On this “pool is so small” argument and responses thereto, see Richard Delgado, *Mindset and Metaphor*, 103 HARV. L. REV. 1872, 1875-76 (1990) (pool metaphor apologetic and inapt because it conjures images of inert, stagnant body filled with fungible material).

Further, the professor offers reasons why this is so.<sup>26</sup> Everyone knows the likely reaction: the calmly given evidence and arguments on behalf of *A* and *B* will scarcely be heard. They will not "register," will not "compute," will certainly not be passed on to the rest of the appointments committee for sober consideration. They are outside the pale, outside the dominant paradigm, which holds that minority candidates are risks, are likely to be marginal publishers and teachers, that those with promise are few in number and difficult to entice, and so forth. The white professor expected to hear about risks; instead he heard about superiority. He expected to discuss the limits of magnanimity, but heard something totally different. He did not expect to hear about the likelihood of *A* or *B*'s professional success, and so the message falls on deaf ears. "Yes, yes, but should we take a *chance*?"<sup>27</sup>

#### B. THE SECOND REASON—RACISM IS NOT A MISTAKE

Assumptions about race are thus very hard to dislodge. They are among the tools with which we reason, parts of the arsenal we use to organize and understand reality. And our understanding changes very slowly. We rarely focus on it; it is like a set of eyeglasses through which we see and interpret the world around us.<sup>28</sup> But there is a second reason why attitudes and beliefs regarding race do not readily change as a result of conversation and dialogue: racist ideas and actions are rarely mistakes.

If you point out to me that I have inadvertently parked in the wrong zone or formed a mistaken belief that heavy objects fall faster than light ones, I will probably quickly concede my error and modify my behavior or beliefs accordingly. With these types of error the marketplace premise of our system of free speech is essentially correct—the right message will rise up and counter the wrong one; truth will conquer error.<sup>29</sup>

26. These reasons might include: superior drive and determination, more highly developed narrative and analytical skills, and a grounding in postmodern and critical thought. See Delgado, *supra* note 22 (reporting that nearly three-fourths of articles on civil rights or feminism appearing in major law reviews between 1985 and 1990 were written by women or minorities); Richard Delgado, *Rodrigo's Chronicle*, 101 YALE L.J. 1357 (1992) (hypothesizing that members of outsider groups may have advantage in grasping and applying modernist and critical thought).

27. A second anecdote illustrates this point. Recently a young African-American lawyer I know was on the legal hiring market. Although young, she had a sterling record in law school and had published her first article in the *Harvard Law Review*. Friends and supporters at a number of the schools where she interviewed found colleagues expressing doubts about her scholarly potential; "How do we know she will publish?" When her supporters pointed out that she had already done so, and in the *Harvard Law Review*, they were met with blank stares, even though the article was prominently listed on her resumé and had been mentioned during many of her interviews.

28. On the eyeglass analogy and the role of preconception in determining what we can see and imagine, see Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207, 209 (1989).

29. See *United States v. Abrams*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (advocating marketplace of ideas theory). For a discussion of the marketplace theory and other functions of

Racism and racial-supremacist ideas are not simple mistakes, however; they are not easily correctable errors of fact that can be dispelled by presenting the truth. To illustrate, imagine a second encounter which takes place at a university campus that has suffered a wave of racist insults and name-calling.<sup>30</sup> The university president has opted against promulgating a campus speech code that would penalize racially demeaning speech uttered in face-to-face situations<sup>31</sup> on the ground that campuses ought to be bastions of free speech.<sup>32</sup> Racism, sexism, and homophobia, the president believes, are products of "ignorance and fear."<sup>33</sup> Since this is so, the president reasons, the appropriate corrective is more speech. We should not attempt to quell or punish expressions of racist ideas, but rather should use them as helpful flags signalling the need for remonstrance, counselling—in short, the truth.

Try to imagine, however, what kind of countervailing message the black victim of a racist insult would deliver to the racist who has just said, perhaps: "You n—. You and your kind do not belong here—why don't you go back to Africa?" If prejudice were indeed a matter of ignorance, then we might visualize the black replying in one of the following ways: (1) "Sir (or madam), did you realize that the better view, in our day and age, is that I, an African American, am your equal and have just as much right to be here as you do?" or (2) "Sir (or madam), did you realize that calling me, a person of African-American heritage and descent, a 'n—' might cause me to take offense? Now that you understand this, in the future, will you please call me — or —?"<sup>34</sup>

These responses are, of course, ludicrous. Racism is not a mistake, like parking in the wrong space or believing that the solar system has eight planets; rather, it is a means of *subjugating another person or group*. The racist insult tells the victim, "Here is how I see you. You occupy this rung in the hierarchy; I occupy this other one." Racism is a hierarchy-maintaining institution. It is enjoyable, as well as profitable, for the group able to get away

---

speech, see Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-86 (1963).

30. The following discussion in the text is based on remarks of various participants at: Panel Discussion, *Campus Speech*, Yale Law School, New Haven, Ct., (Oct. 1991) [hereinafter Panel Discussion].

31. Most campus codes limit their proscription of hate speech to such situations. See generally Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991) (discussing student conduct rules drafted to cope with campus racism and name-calling); Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) (same).

32. Panel Discussion, *supra* note 30 (remarks by Benno C. Schmidt, Professor of Law and President of Yale University); Delgado, *supra* note 31, at 359-60 (discussing "bastion of freedom" argument).

33. Panel Discussion, *supra* note 30 (remarks by Benno C. Schmidt, Professor of Law and President of Yale University).

34. *Id.* (remarks by Richard Delgado).

with it.<sup>35</sup> If the subordinated group internalizes some of the messages of inferiority, so that it comes to consent to its own oppression, so much the better.<sup>36</sup> Counter-racist messages, then, are not only unheard (because they fall outside the dominant paradigm), but ineffectual because their premise is misconceived. The point of a racist practice is to secure and defend advantage, not to pursue truth.<sup>37</sup>

### C. THE THIRD REASON—REMEDYING RACISM THROUGH DIALOGUE IS IMPRACTICAL

A small percentage of racism is, in fact, recognized at the time of its commission,<sup>38</sup> and a small number of advantage-seeking subordinators can be persuaded to discontinue their actions by the right counter-racist message.<sup>39</sup> But why would one want to operate in this fashion, at least without exploring and comparing other possibly more effective avenues? Many social scientists today subscribe to some version of the "confrontation" theory for reducing racism, one that does not rest primarily on moral suasion or dialogue.<sup>40</sup> Consider some of the barriers to establishing an effective counter-racist dialogue with a racist individual or institution:<sup>41</sup>

1. The initiator of the counter-racist dialogue will probably be a person of minority race, or a majority-race stand-in, and hence will lack credibility in the eyes of the other parties to the dialogue.<sup>42</sup>
2. The stronger party will be asked to admit error—something every lawyer knows to be a barrier to negotiation or settlement.<sup>43</sup>

---

35. *Id.*

36. On hegemony and "false consciousness" (whereby the oppressed internalize and accept their own oppression), see generally GRAMSCI, *supra* note 22, at 323-43.

37. On the economic-determinist view of racism, see generally BELL, *supra* note 11, at 51-74; Derrick Bell, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980). See also Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758 (discussing Black nationalism and separatism as response to culture's indifference to Black causes).

38. I refer to the type of blatantly racist act—cross-burning, lynching, lying about an apartment's availability—that we all seize on and condemn, that we "love to hate." ("This is racism—see, we condemn it"; outside it, nothing else happens.)

39. See *infra* note 60 and accompanying text (giving examples of messages that occasionally work).

40. For a discussion of the confrontation approach (which relies on punishment, watchfulness, and vigilant enforcement) and its relation to the "contact" hypothesis (which emphasizes teaching, example, and cooperative activity to reduce racist attitudes and behavior), see Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375-91 (discussing social science theories on racism's etiology as well as control).

41. I mentioned a few of these barriers in Delgado, *supra* note 1, at 1939-40.

42. See Delgado, *supra* note 31, at 385 (arguing that racism reduces the credibility of its victims, making free speech much more useful to the majority than minority).

43. See GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS* 543 (1978) (on dynamics of negotiation and lawyer interaction).



3. The two sides to the dialogue will be asked to trust each other, a trust that will seem to one (the black) to be belied by 200 years of history.<sup>44</sup>
4. The two sides will begin with different definitions, preconceptions, and world-views, necessitating a lengthy "dialog-about-dialog" before the real dialogue can begin.<sup>45</sup>
5. One side (again, the black) will enter in a spirit of pessimism,<sup>46</sup> knowing from experience that "talk is cheap," and will suspect that this dialogue, like all the others, will be coercive—that she will be the one expected to make concessions. This party will recall that the dominant group, prior to every racist or imperialist action, has justified its course by talk, frequently of a normative or religious sort.<sup>47</sup>

## II. A SPECIAL REASON FOR SKEPTICISM—THE NORMATIVE QUALITY OF THE DIALOGUE FELDMAN ENVISIONS

Since much racism is perpetrated either blithely<sup>48</sup> or for advantage,<sup>49</sup> most of the dialogue the communitarians have in mind will probably be highly normative. "You don't see what you did as offensive? Well, you should!" Or, "I realize you do this to feel good, gain advantage, eliminate the competition, keep your other tenants happy, and so on, but you should nevertheless stop." Feldman's own descriptions of dialogism make this plain. For example, dialogue will be aimed at identifying "the common good."<sup>50</sup> It will enable us to "transform" (presumably for the better) our viewpoints.<sup>51</sup> It will promote a "feminist ethic of caring."<sup>52</sup> It will "encourage concern for and connection with others."<sup>53</sup> It will develop a "public norm with potentially positive effects."<sup>54</sup> It will use "love" and "*agape*" as tools of conversion.<sup>55</sup> It will enable a "transformative dialogue . . . [resulting in] communal growth or improvement."<sup>56</sup> It will "appeal to the moral conscience of the entire polit-

44. See generally BELL, *supra* note 11 (reviewing United States history of black-white relations, concluding on pessimistic note); DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* (2d ed. 1980) (same); Derrick Bell, *Racial Realism*, 24 CONN. L. REV. (forthcoming 1992) (arguing that blacks and other persons of color should understand that existing American political and legal systems are unlikely to afford much relief).

45. Delgado, *supra* note 1, at 1939-40.

46. See Bell, *Racial Realism*, *supra* note 44 (participants to dialogue radically unequal in power and resources); Delgado, *supra* note 1, at 1939 (same).

47. For a discussion of the role of normative discourse to legitimate ruthless action against weaker populations, see Delgado, *supra* note 12, at 937-59. See also *infra* Part II.

48. See *supra* Part I.A (racism part of dominant narrative, hence nearly invisible).

49. See *supra* Part I.B (racism promotes advantage).

50. Feldman, *supra* note 5, at 1836.

51. *Id.* at 1841.

52. *Id.* at 1861.

53. *Id.* at 1861-62, 1864-65, 1871.

54. *Id.* at 1865.

55. *Id.* at 1869-70.

56. *Id.* at 1871.

ical community by pursuing the common good."<sup>57</sup>

As I have mentioned earlier, there is nothing wrong with employing counter-racist messages and dialogue; some may actually do some small good.<sup>58</sup> The trouble is that highly normative talk—full of importuning, pleading, imploring, and pronouncements of this or that course of action as wrong and evil—is likely to fail, and very possibly make matters worse.

There already exists a well-known norm against discrimination and prejudice.<sup>59</sup> What good would further remonstrance do? As the emerging critique of normativity demonstrates, for every normative argument there is an equally plausible normative counterargument.<sup>60</sup> Affirmative action is necessary to redress discrimination; affirmative action is unfair to innocent whites. Diversity is good; we must maintain standards. Our normative system is so open-ended that by choosing a premise carefully, one side can make it appear that the other is trying to do something unscrupulous, is trying to play the game by unfair rules, is political, self-interested, unprincipled, wrong. Normative discourse, in short, is indeterminate and manipulable.<sup>61</sup> But using normative appeals, eliciting the predictable countering responses, round and round in familiar, well-worn circles, inscribes the ineffectual discourse patterns (in which minorities lose) even more deeply.<sup>62</sup> Not only does a moral appeal rarely get anywhere, it often obscures the very dilemma.

The main threat to human dignity and autonomy today is not individual agents with vicious wills. It is large bureaucracies—corporations, HMOs,

---

57. *Id.* at 1872, 1877.

58. For example, "If you do that again, we will ostracize you, boycott your business, charge you with a Title VII violation."

59. See generally GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* (spec. ed. 1979) (pointing out that the problem is how to get people to act on this norm). In law, the antidiscrimination norm is incorporated into three constitutional amendments (the Thirteenth, Fourteenth, and Fifteenth), and a host of legislation prohibiting discrimination in education, housing, employment, and various business practices, both at the state and federal level. See, e.g., THEODORE EISENBERG, *CIVIL RIGHTS LEGISLATION* 3-7 (3d ed. 1991) (discussing statutes enacted to protect civil rights); NORMAN VIEIRA, *CONSTITUTIONAL CIVIL RIGHTS IN A NUTSHELL* 61-140, 210-49 (2d ed. 1990) (same).

60. See Delgado, *supra* note 12, at 938-44 (indeterminacy of normative discourse facilitates self-deception, rationalization, and "striking a deal with the future"); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 167 (1990) ("the exhilarating experience that comes from reading a provocative new piece of Legal Thought . . . will give way to ennui as the new piece of Legal Thought unravels.").

61. For a related critique by critical legal scholars of determinacy in legal reasoning, see generally THE POLITICS OF LAW (David Kairys ed., 2d ed. 1990). On the feminist critique of the legal system as embodying a (frequently unseen) male, patriarchal bias, see generally CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987).

62. The best exposition of this view is Schlag, *supra* note 60. See also Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 932 (1991) (normative legal thought rehearses and inscribes a false social aesthetic).

industries, and political parties.<sup>63</sup> These organizations function best if they can treat the rest of us impersonally, as numbers, members of large, faceless groups. They dislike change, dislike challenge. All these are inefficient. Yet, impersonal treatment (all blacks must work as custodians; all taxpayers must fill out this twenty-one-page form) could breed resentment, which could disrupt the routine.<sup>64</sup> Therefore, bureaucracies adopt a host of smiling agents to talk with us, reassure us that we are, indeed, being treated as individuals, being treated with respect, when in fact we are not. These agents—lawyers, personnel managers, insurance adjusters, claims agents, and other “front” persons—talk a particular language—normativity. “We want, of course, to do what is fair, but you must admit your share of the responsibility in this accident. We must be fair to our other policyholders.” Or, “Mr. Jones, we are sorry we cannot hire you for the position. While you might turn out to be an outstanding teacher and scholar, Civil Rights is not high on our list of priorities for course coverage this year; and, further, your class standing . . .” Or, “The HMO cannot grant your claim—we must think of our *other* patients.”<sup>65</sup>

In each of these well-rehearsed and earnest-seeming discussions the script turns out to be written by someone else—what I call the “Home Office.” If we press a little, we will discover that the insurance adjuster does not really care for us as persons. The point of the numbing, familiar dialogue is to lull, to gull, us into thinking the organization really does care—values our health, our contribution to a multiethnic faculty, values us as consumers. If we go along with the script we will cause little trouble, may indeed end up thinking we behaved virtuously. But we have been set up. We have been, like the doe in the headlights, transfixed by the approaching automobile. To be sure, sometimes the kind driver will swerve; sometimes the insurance adjuster will grant a claim—it turns out he or she had a little discretion after all. The doctor will see us now, not next month. The law school will hire a token black. But the doe’s problem is not the approaching car—it is the road. Another car will come along. In the same way, allowing ourselves to be mesmerized by familiar, soothing normative talk disables us from appreciating our own dilemma, from seeing who is responsible for it, from seeing the way out of it.

If we enter into the platitudinous, scripted discourse that normative talk demands, we will cause little trouble. But from time to time we will get a little jolt—be brought up short, made to realize it was the Home Office that was calling the shots after all. The superbly qualified minority was not

---

63. For the initial development of the textual argument, see Delgado, *supra* note 12, at 956-58 (normative discourse affirmatively justifies cruelty toward others and sets up the listener).

64. *Id.* at 957.

65. *Id.* at 958-59.

hired—what happened? I made those wonderful normative arguments. They said . . . I thought . . .

### CONCLUSION

I have argued that Feldman, like most conversationalists, overestimates the ability of dialogue to counter racism. We simply do not see most of today's forms of racism. Speaking against it is a near-impossibility, and the few counter-racist speakers, authors, painters, and other communicators have no audience. We also underestimate racism's momentum. Powerful actors and institutions benefit from it—why should they stop merely because we want to talk things over with them? Finally, the highly normative nature of the conversation Feldman contemplates presents problems of its own—problems of efficacy, problems of lulling, problems of inscribing the routine a little deeper—even as we think we are striking a blow for truth and justice.

Feldman's mistake is natural. A nonracist himself, he thinks, "If I could only talk with David Duke, or the chair of the appointments committee, or the member of Bush's cabinet who . . . , I am sure I could change her mind. I could get her to see . . . ." A fault of conversationalism is that we assign it the efficacy it would have if we (the right-thinking conversationalists) were to prevail in every case. But the dominant narrative changes very slowly. Ask yourself, when is the last time you succeeded, through argument alone, in changing another person's position on a matter of fundamental normative importance, such as abortion?

Toward the end of his article, Feldman seems to concede that conversationalism might have limits, and that interest-convergence and logrolling of the sort I put forward in *Zero-Based Racial Politics* might be a more effective means of securing advances for outsider groups.<sup>66</sup> We should work both approaches, Feldman says, employing interest-convergence where it seems fitting, while using dialogue and suasion to change attitudes and moral climate. I find no fault with this formulation; as a racial realist, I believe there is little we can do to improve our position,<sup>67</sup> so we might as well try anything. However, I would make one small modification in the twin strategy Feldman proposes. People of color should occupy themselves with interest-convergence. We should lobby, agitate, destabilize, rock the boat, and constantly point out to the powers that be why it is in their interest to permit occasional, small gains for blacks and other minorities. As Derrick Bell put it recently (out of

---

66. Feldman, *supra* note 5, at 1877 ("The nonwhite poor, consequently, might consider a dual strategy.").

67. I have elaborated my pessimistic view of our racial prospects in Richard Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) (reviewing DERRICK BELL, *AND WE ARE NOT SAVED* (1987)).

the mouth of an old black woman), "I lives to harass white folks."<sup>68</sup>

It is people of the majority race, persons of good will, well-wishers and fellow-travellers like Feldman, who should take on the task of conversation. They should be the ones to take the case to their recalcitrant brothers and sisters, to remonstrate, cajole, importune, and preach the normative messages of brotherhood, equality, and decency that are inscribed in our founding documents. For the reasons I have mentioned, this is likely to do little good. But if done carefully, with awareness of its limitations and risks, it will probably do little harm either, and in the meantime it at least keeps issues of racial justice on the front burner.

---

68. Bell, *Racial Realism*, *supra* note 44.